

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

HUBERT LUSK,

Petitioner,

vs.

**Civil Action No. 2:10 CV 5
(Maxwell)**

DAVID BALLARD, WARDEN,

Respondent.

ORDER

The above-styled civil action was instituted on January 14, 2010, when *pro se* Petitioner Hubert Lusk filed a petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody. The above-styled civil action was referred to United States Magistrate Judge John S. Kaull for initial review and report and recommendation, pursuant to Rule 83.09 of the Local Rules of Prisoner Litigation Procedure.

On January 14, 2010, the *pro se* petitioner also filed an Application to Proceed Without Prepayment of Fees. On January 15, 2010, United States Magistrate Judge John S. Kaull filed an Opinion/Report and Recommendation wherein he recommended that the petitioner's Application to Proceed Without Prepayment of Fees be denied and that the petitioner be directed to pay the full filing fee. Specifically, Magistrate Judge Kaull found that the petitioner was able to pay the \$5.00 filing fee for a habeas corpus action based on the fact that the petitioner is employed by the facility where he is housed and earns approximately \$85.00 per month and the fact that the average daily balance in the petitioner's inmate account has been approximately \$4900.00.

Magistrate Judge Kaull's Opinion/Report and Recommendation expressly advised the petitioner, in accordance with 28 U.S.C. § 636(b)(1), to file with the Clerk of Court any

written objections to said Opinion/Report and Recommendation within fourteen days after being served with a copy of the same. Said Opinion/Report and Recommendation further advised the petitioner that a failure to timely file objections to the Opinion/Report and Recommendation would result in the waiver of the right to appeal from a judgment of this Court based thereon.

On January 22, 2010, the petitioner filed a letter Motion seeking the appointment of counsel. Said letter Motion was also docketed by the Clerk of Court as objections to Magistrate Judge Kaull's Opinion/Report and Recommendation in light of the fact that the petitioner indicates that he will pay the \$5.00 filing fee¹ but still requests that he be granted leave to proceed *in forma pauperis* in order that counsel might be appointed for him. The petitioner's letter Motion seeking the appointment of counsel was denied by an Order entered March 3, 2010, by Magistrate Judge Kaull. In his Order, Magistrate Judge Kaull indicated that the petitioner had failed to demonstrate circumstances demonstrating the need for the appointment of counsel and that the need for an evidentiary hearing or discovery was not readily apparent at that time.

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of Magistrate Judge Kaull's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of Magistrate Judge Kaull as to those portions of the findings or recommendation to which no objections are addressed. ***Thomas v. Arn***, 474 U.S. 140, 150 (1985). In addition, failure to file timely objections constitutes a waiver of *de novo* review and the petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1);

¹The docket in this matter does, in fact, reflect that the Petitioner made payment of the \$5.00 filing fee on January 26, 2010 (Docket No. 10).

Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1980); **United States v. Schronce**, 727 F.2d 91, 94 (4th Cir. 1984). Accordingly, this Court has conducted a *de novo* review only as to the portions of the Opinion/Report and Recommendation to which the petitioner objected. The remaining portions of the Opinion/Report and Recommendation to which the petitioner did not object were reviewed for clear error.

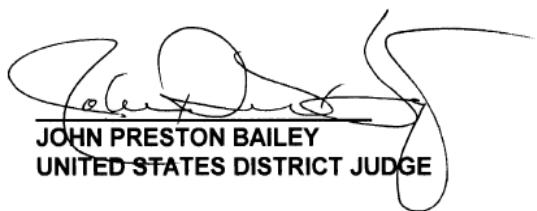
Upon examination of Magistrate Judge Kaull's Opinion/Report and Recommendation and the petitioner's objections thereto, it appears to the Court that the issues raised by the petitioner in his objections were thoroughly considered by Magistrate Judge Kaull in his Opinion/Report and Recommendation and in his decision to deny the petitioner's Motion seeking the appointment of counsel. It further appears to the Court that Magistrate Judge Kaull's Opinion/Report and Recommendation accurately reflects the law applicable to the facts and circumstances before the Court in the above-styled civil action. Moreover, the Court is of the opinion that the petitioner's Application to Proceed Without Prepayment is now moot in light of the fact that he made payment of the \$5.00 filing fee on January 26, 2010. For all of the foregoing reasons, it is

ORDERED that the Opinion/Report and Recommendation entered by United States Magistrate Judge John S. Kaull on January 15, 2010, (Doc. 5), be, and the same hereby is, **ACCEPTED**. It is further

ORDERED that the petitioner's Application to Proceed Without Prepayment of Fees (Doc. 2) be, and the same is hereby, **DENIED**.

The Clerk of Court is directed to transmit copies of this Order to the petitioner and to any counsel of record.

DATED: July 30, 2010.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE